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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

APR 02 2010

FILE: EAC 08 141 50007 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Penny Rheu
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a retail trade and investment company and is doing business as a gas station and carwash with a convenience store. The petitioner has three employees and a stated gross annual income of \$180,000. It seeks to employ the beneficiary as a finance manager pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B and brief submitted by counsel. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a finance manager. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 18, 2008 support letter; and counsel’s letter in response to the RFE. The support letter, together with the RFE response letter, indicates the proffered position would require the beneficiary to perform the following duties:

- Develop and implement financial plans, utilizing knowledge in accounting and financing (50% of the time);

- Consulting with management to determine assets, liabilities, cash flow, insurance coverage, tax status and financial objectives (25% of the time); and
- Analyzing financial status of the company and developing financial plans based on analysis of data, including formulating forecasts of the business, industry and economic conditions to make investment decisions (25% of the time).

The petitioner describes the purpose for creating the position of finance manager as follows:

We are a retail trade and investment company, along with a 5-bay carwash, located at [Beaumont, Texas]. We are a new venture, but one with a tremendous amount of potential. Our company was established in 2008 and our gross income is estimated to be \$180,000 per year; we anticipate a great deal of growth in the coming year. Our owner, [REDACTED], owns a series of businesses throughout the community, and we therefore have a legitimate need for the services of a Finance Manager.

* * *

Due to the nature and complexity of the work involved in this position, along with the clear importance of that work, we require the position holder to possess a Bachelor's degree with a solid background in business management.

The petitioner submitted copies of the beneficiary's foreign diploma and transcripts. The educational evaluation submitted in response to the RFE evaluates the beneficiary's foreign degree as equivalent to a U.S. Master of Business Administration degree from an accredited college or university in the United States.

The photos provided by the petitioner indicate that the petitioner's business is a gas station with a car wash and convenience store attached.

The Labor Condition Application (LCA) was submitted for a finance manager to work at the petitioner's offices in Beaumont, TX at an annual salary of \$27,082. The petitioner also submitted a copy of the prevailing wage used to support the LCA, which is for a financial analyst, rather than a finance manager.

On April 26, 2008, the director requested additional information from the petitioner. In part, the director requested the following: (1) a detailed description of each position and the position duties for all three of the petitioner's employees; (2) evidence to establish that the petitioner can sustain an employee performing duties at the level required for consideration as a specialty occupation; and (3) a more detailed description of the proffered position.

Counsel for the petitioner responded to the RFE by essentially reiterating the duties provided with the initial petition, indicating the percentages of time spent in each (provided above). Counsel states that of the petitioner's three employees, one is a marketing manager, who gathers and analyzes data in terms of competition in the local area and evaluating advertising, and two are sales associates

responsible for transactions with customers using cash registers. Counsel further states that the petitioner is a new business and so has not filed any tax returns. Counsel instead provides financial documentation regarding [REDACTED] alleged other businesses, although counsel does not provide evidence demonstrating [REDACTED] ownership interest in these businesses, such as articles of incorporation, corporate stock certificates, stock certificate registries or ledgers, corporate bylaws, minutes of relevant annual shareholder meetings, proxy agreements, and any other relevant documentation, nor does counsel provide evidence that [REDACTED] or these other businesses will fund the petitioner or the amount of capital that will be accorded to the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel further states on appeal that the petitioner is in the process of acquiring over five new stores by the end of 2008, but provides no evidence of this alleged acquisition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, counsel asserts that the proffered position is a specialty occupation. Additionally, counsel argues that the petitioner is sufficiently large and complex to justify the hiring of a finance manager. Counsel includes copies of financial statements for five months, ending May 31, 2008, along with the petitioner's general ledger. These documents indicate that the petitioner has not paid any salaries to its three employees and that it is operating at a loss. Counsel also includes a copy of the petitioner's business plan, which lists the salaries of two sales representatives as part of its estimated expenses, but does not include any provision for hiring a finance manager.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's Occupational Outlook Handbook, 2010-11 Edition (*Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F.

Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the petitioner gives the proffered position the title of finance manager, although the LCA is based on the prevailing wage of a financial analyst. Regardless, the characterization of the proffered position as either a finance manager or a financial analyst is not accurate given that the evidence of record shows that the petitioner is a gas station with a car wash and convenience store that employs three people, two of whom are store clerks. Insufficient evidence was provided to demonstrate that the petitioner is in a position to expand its business operations. Indeed, it is not clear that the petitioner has sufficient revenue to maintain even its own operations at its current level. According to the *Handbook*, a financial analyst provides guidance to businesses and individuals making investment decisions. Financial analysts assess the performance of stocks, bonds, commodities, and other types of investments. As this is not part of the job description of the proffered position, the AAO cannot classify this position as a financial analyst. Likewise, the classification of this position as a finance manager, which, according to the *Handbook*, includes the positions of controller, treasurer or finance officer, credit manager, cash manager, risk and insurance manager, and manager of international banking, does not seem appropriate given the nature of the petitioner's business operations. This assessment that the proffered position is not a finance manager or financial analyst is not based on the petitioner's size but, rather, on the lack of evidence demonstrating that the petitioner has the means to expand its business operations to the extent the petitioner and counsel describe, such that it would have sufficient work as a finance manager for the beneficiary to perform.

Moreover, the prevailing wage on which the LCA is based is for a financial analyst, and not a finance manager. Therefore, even if the petitioner could demonstrate that the proffered position is actually closer to that of a finance manager, the AAO would have to deny the petition on the ground that it is not supported by an LCA that corresponds with the petition. See 20 C.F.R. § 655.705(b); 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

Because it is not clear that the petitioner's business justified the hiring of a full-time finance manager based on the initial petition, the RFE stated:

[T]he proffered position does not appear to involve such specialization or complexity as to require the knowledge associated with the attainment of a baccalaureate degree or is commensurate with the nature, scope, and/or size of the employer's business enterprise. It is also not clear how the beneficiary will be relieved from performing non-qualifying functions. Therefore, evidence is required to establish that the petitioner can sustain an employee performing duties at the level required for consideration as a "specialty occupation" per 8 CFR 214.2(h)(4)(ii).

This additional evidence was requested by USCIS in order to determine whether the proffered position was a specialty occupation as insufficient information was provided initially. As discussed previously, counsel does not provide sufficient documentation demonstrating that the petitioner requires a finance

manager. Without a detailed explanation and supporting documentation from the petitioner as to why its business, which entails a gas station with car wash and convenience market, employing a total of three workers, two of whom are convenience store clerks, requires a full-time finance manager, the evidence is insufficient to determine that the proffered position is a specialty occupation.

The AAO therefore finds that, given the lack of evidence provided by the petitioner that the proffered position is a finance manager or financial analyst, the proffered position is closest to the *Handbook's* description of bookkeeping, accounting, and auditing clerks, which provides in pertinent part:

Bookkeeping, accounting, and auditing clerks are financial recordkeepers. They update and maintain accounting records, including those which calculate expenditures, receipts, accounts payable and receivable, and profit and loss. These workers have a wide range of skills from full-charge bookkeepers, who can maintain an entire company's books, to accounting clerks who handle specific tasks. All these clerks make numerous computations each day and must be comfortable using computers to calculate and record data.

In small businesses, bookkeepers and bookkeeping clerks often have responsibility for some or all the accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income). They also produce financial statements and prepare reports and summaries for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. Additionally, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

In large companies, accounting clerks have more specialized tasks. Their titles, such as accounts payable clerk or accounts receivable clerk, often reflect the type of accounting they do. In addition, their responsibilities vary by level of experience. Entry-level accounting clerks post details of transactions, total accounts, and compute interest charges. They also may monitor loans and accounts to ensure that payments are up to date. More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure the completeness and accuracy of data on accounts; and code documents according to company procedures.

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are mathematically accurate, and properly coded. They also correct or note errors for accountants or other workers to fix.

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases. Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, procurement, and billing. Many of these functions require these clerks to write letters and make phone calls to customers or clients.

With respect to education and training requirements for bookkeeping, accounting, and auditing clerks, the *Handbook* states:

Most bookkeeping, accounting, and auditing clerks are required to have a high school degree at a minimum. However, having some postsecondary education is increasingly important and an associate degree in business or accounting is required for some positions. Although a bachelor's degree is rarely required, graduates may accept bookkeeping, accounting, and auditing clerk positions to get into a particular company or to enter the accounting or finance field with the hope of eventually being promoted.

In other words, a bachelor's degree in a specific specialty is not required. This is supported by the petitioner's statement in the support letter that the proffered position requires a bachelor's degree, without requiring the degree to be in a specific specialty.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As the *Handbook* indicates no degree requirement for employment as a bookkeeping, accounting or auditing clerk, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to

the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner and counsel have not submitted any advertisements or other documentation to establish its degree requirement as an industry norm. As a result, the petitioner has not established a degree requirement in parallel positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than bookkeeping, accounting, or auditing clerk positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO does not find that sufficient evidence was provided to demonstrate that the proffered duties, as described by the petitioner in its initial support letter, reflect a higher degree of knowledge and skill than would normally be required of bookkeeping, accounting, and auditing clerks who have responsibility for the accounts and financial statements. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that it has

sufficient work for the beneficiary to be employed in a specialty occupation. As mentioned above, even though [REDACTED] may own other businesses, no documentation was submitted to establish [REDACTED]'s ownership interest in these businesses or how much, if any, revenue would be provided to adequately fund the petitioner from these other entities. Without such documentation, the AAO cannot establish whether the petitioner has made a bona fide offer of employment to the beneficiary such that it could be found that it will fully comply with the terms and conditions of employment as attested to in the instant petition. *See generally* 8 C.F.R. § 214.2(h)(4). The AAO thereby finds that the petitioner does not qualify as a United States employer as it has failed to establish that it has sufficient work and resources for the beneficiary such that it has demonstrated that it will have and maintain an employer-employee relationship on a full-time basis as claimed in the petition and as required by 8 C.F.R. § 214.2(h)(4)(ii).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.